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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/552,428

10/07/2005

Douglas John Hughes

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3705 7590 08/31/2007  
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EXAMINER

KHAN, AMINA S

ART UNIT

PAPER NUMBER

1751

MAIL DATE

DELIVERY MODE

08/31/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/552,428

Applicant(s)

HUGHES, DOUGLAS JOHN

Examiner

Amina Khan

Art Unit

1751

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 6/11/2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1 and 4-28 is/are pending in the application.
- 4a) Of the above claim(s) 11-14 and 20-27 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-10,15-19 and 28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on July 11, 2007 has been entered.

2. Claims 1,4-10, 15-19 and 28 are pending. Claims 2 and 3 have been cancelled. Claims 11-14 and 20-27 have been withdrawn due to a non-elected invention. Claims 1,8-10,15 and 16 have been amended. Claims 20-28 are new.

3. The objection to the specification is withdrawn.

4. All prior rejections are withdrawn in view of applicant's amendments.

### ***Election/Restrictions***

5. Newly submitted claim 20-27 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: the instantly

claimed compositions can be applied to non-foliar substrates such as fabrics and by methods other than those of method claimed in claims 20-27.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 20-27 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1,4-10,15-19 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Drahos et al. (US 6,659,425) in view of "From Rovral to Chipco, but always Green" (<http://www.bayer-escience.co.uk/ChipcoGreenStory.pdf>).

Drahos et al. teach foliage sprays comprising humic or fulvic acids (column 3, lines 10-25), urea, iron EDTA (column 11, table 6), and water (column 7, lines 20-25).

Drahos et al. do not teach dyes and the proportion of dye to humic/fulvic acid.

The Rovral article, in the analogous art of fungicides, teaches acid blue 9 colorant has been added to fungicides since 1982 (page 2, paragraphs 1 and 2; page 3, paragraph 3).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the foliage sprays taught by Drahos et al. by incorporating the acid blue 9 as taught by the Rovral article because the article teaches that the dyes are added conventionally to impart a characteristic color to the fungicide. It is prima facie obvious to combine the two compounds, each taught for the same purpose, to yield a third composition for that very purpose. *In re Kerkhoven*, 205 USPQ 1069, *In re Pinten*, 173 USPQ 801, and *In re Susi*, 169 USPQ 423 when ingredients are well known and combined for their known properties, the combination is obvious absent unexpected results. A person of ordinary skill in the fungicide would expect combinations of these materials to behave in the same fashion as the individual materials, absent unexpected results.

Regarding the ratio of humic/fulvic acid to colorant, it would have been obvious to optimize the concentrations of components to the instantly claimed values because the Rovral article teaches that the "green " reflects both the color of the formulation and the greening up effect of the grass when the Rovral is applied to the turf in the winter. Optimization of the dye and the humic acid would result in enhanced greening of the turf treated. One of ordinary skill would have been motivated to combine the teaching of the references absent unexpected results.

The "consisting essentially of" language does not necessarily exclude the presence of other components because "consisting essentially of" renders the composition open to the inclusion of unspecified ingredients which do not materially affect the basic and novel characteristics of the composition, see *Ex parte Davis et al.* (Bd of Appeals), 80 USPQ 448. Applicants have not submitted factual evidence showing that the additional components taught in Drahos and the Rovral article materially affect the instant invention.

8. Claims 1,4-10,15-19 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Drahos et al. (US 6,659,425) in view of Forsyth et al. (US 6,541,421).

Drahos et al. teach foliage sprays comprising 0-10% biosupplement (column 10, Table 6) such as humic or fulvic acids (column 3, lines 10-25), urea, iron EDTA (column 11, table 6), and water (column 7, lines 20-25).

Drahos et al. do not teach dyes and the proportion of dye to humic/fulvic acid.

Forsyth et al., in the analogous art of fungicides (abstract), teaches adding 0.002% (10g/350L) Hexacol Acid Blue 9 to fungicide compositions (column 4, lines 20-25).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the foliage sprays taught by Drahos et al. by incorporating the 0.002% Hexacol acid blue 9 as taught by the Forsyth et al. because Forsyth et al. teach that the dyes are added conventionally to distinguish the fungicide from water. It is prima facie obvious to combine the two compounds, each taught for the

same purpose, to yield a third composition for that very purpose. *In re Kerkhoven*, 205 USPQ 1069, *In re Pinten*, 173 USPQ 801, and *In re Susi*, 169 USPQ 423 when ingredients are well known and combined for their known properties, the combination is obvious absent unexpected results. A person of ordinary skill in the fungicide would expect combinations of these materials to behave in the same fashion as the individual materials, absent unexpected results.

Regarding the ratio of humic/fulvic acid to colorant, it would have been obvious to optimize the concentrations of components to the instantly claimed values because Drahos et al. teach using 0-10% humic acid/fulvic acid and Forsyth et al. teach 0.002% dye is sufficient to color the fungicide. These ranges encompass the ratio instantly claimed. One of ordinary skill would have been motivated to combine the teaching of the references absent unexpected results.

The "consisting essentially of" language does not necessarily exclude the presence of other components because "consisting essentially of" renders the composition open to the inclusion of unspecified ingredients which do not materially affect the basic and novel characteristics of the composition, see *Ex parte Davis et al.* (Bd of Appeals), 80 USPQ 448. Applicants have not submitted factual evidence showing that the additional components taught in Drahos and Forsyth materially affect the instant invention.

9. Claims 1,4-7,10,15-17 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bessette (US 2004/0192551) in view of JP 62148405.

Besette teaches herbicidal compositions comprising water (paragraph 0035), surface active agents (paragraph 0037), colorants and iron salts (paragraph 0039) and 2.5% humic/fulvic acids for application to weeds and grass (paragraph 0057).

Besette does not teach dyes.

JP 62148405 teaches herbicidal compositions comprising colorants such as Acid Blue 1 (abstract)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the herbicides taught by Besette by incorporating the acid blue 1 as taught by JP 62148405 because JP 62148405 teaches that the dyes are added conventionally to impart a characteristic color to the herbicides. It is prima facie obvious to combine the two compounds, each taught for the same purpose, to yield a third composition for that very purpose. *In re Kerkhoven*, 205 USPQ 1069, *In re Pinten*, 173 USPQ 801, and *In re Susi*, 169 USPQ 423 when ingredients are well known and combined for their known properties, the combination is obvious absent unexpected results. A person of ordinary skill in the fungicide would expect combinations of these materials to behave in the same fashion as the individual materials, absent unexpected results.

The "consisting essentially of" language does not necessarily exclude the presence of other components because "consisting essentially of" renders the composition open to the inclusion of unspecified ingredients which do not materially affect the basic and novel characteristics of the composition, see *Ex parte Davis et al.* (Bd of Appeals), 80 USPQ 448. Applicants have not submitted factual evidence showing



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that the additional components taught in Bessette and JP 362148405 materially affect the instant invention.

**Conclusion**

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amina Khan whose telephone number is (571) 272-5573. The examiner can normally be reached on Monday through Friday, 8:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on (571) 272-1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

AK

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8-27-07

*Lorna M. Douyon*  
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PRIMARY EXAMINER